APPENDIX

I.

DOCKET ENTRIES

(U. S. District Court, Middle District of Pennsylvania)

May 5, 1949, Complaint. Summons issued returnable 20 days after service. Copies of complaint, summons and copy handed U. S. Marshal.

May 16, 1949, Summons returned served May 12, 1949; also copy of complaint.

May 20, 1949, Defendants request for extension of 20 days within which to file answer.

May 28, 1949, Objections of plaintiff to defendant's request for an extension of time to file an answer.

May 31, 1949, Answer of defendant; and counter-claim.

June 14, 1949, Amendments to answer.

June 16, 1949, Plaintiff's reply to counter-claim.

August 10, 1949, Deposition of Edward K. Ploner on behalf of plaintiff.

August 31, 1949, Plaintiff's motion for summary judgment; notice that said motion will be brought on for hearing 9-13-49 at 10:00 a.m. at Harrisburg.

August 31, 1949, Proof of service of motion and notice.

Sept. 5, 1949, Appearance of S. A. Schreckengaust, Jr., Esquire, as attorney for defendant.

Sept. 15, 1949, Stipulation of counsel continuing hearing on motion for summary judgment to October 11, 1949, at Harrisburg, Pa., at 10:00 a.m.

Sept. 15, 1949, Order approving stipulation.

Sept. 16, 1949, Notice of approval by Judge Follmer mailed counsel of record.

Oct. 6, 1949, Copy of order Miscellaneous Docket No. 84 continuing motion court from October 11 to October 14, 1949, mailed counsel of record.

Oct. 10, 1949, Motion for leave to amend answer and consent to filing of amended answer and order allowing defendant to amend his answer.

Oct. 10, 1949, Amended answer and acceptance of service thereof.

Oct. 14, 1949, Defendant's affidavit under Rule 56.

Oct. 14, 1949, Argument on motion for summary judgment before Judge Follmer. Decision to be handed down.

June 10, 1950, Opinion (Follmer), decree. "The defendant, S. A. Wentling, is permanently enjoined and restrained from committing further acts of unfair competition in relation to fair trade market products of plaintiff, Sunbeam Corporation, and from violating said plaintiff's fair trade agreements, and the defendant's counter-claim is dismissed." Copies of opinion and decree mailed counsel of record and the Attorney General. Judgment of a permanent injunction entered against defendant, S. A. Wentling, as stated in the decree filed this date.

Docket Entries

July 7, 1950, Notice of appeal from order entered June 10, 1950. Copies of notice of appeal mailed counsel for plaintiff and to the U. S. Circuit Court of Appeals for the Third Circuit. Cash deposit in the sum of $250.00 in lieu of cost bond on appeal.

July 10, 1950, Praecipe to tax plaintiff's bill of costs in the sum of $84.05. Notice that plaintiff's bill of costs will be taxed July 11, 1950, mailed defendant.

July 11, 1950, Plaintiff's bill of costs in the sum of $84.05 taxed in this case.

July 11, 1950, Receipt from Court of Appeals of notice of appeal.

August 7, 1950, Letter from U. S. Court of Appeals acknowledging receipt of files on appeal.

II.

OPINION

This is a suit for injunctive relief and damages under the Fair Trade Act of the Commonwealth of Pennsylvania, approved June 5, 1935, P.L. 266, as amended June 12, 1941, P.L. 128.

The title to the said Act reads as follows:

> "To protect trade-mark owners, distributors, and the public against injuries and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name."

The pertinent portion of the Act, as amended, provides as follows (73 PS 7 and 8):

> "No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, or the vending equipment from which said commodity is sold to the consumer bears the trade-mark, brand or the name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed in violation of any law of the State of Pennsylvania by reason of any of the following provisions which may be contained in such contract:

"(a) That the buyer will not resell such commodity, except at the price stipulated by the vendor.

"(b) That the buyer of such commodity require upon his resale of such commodity that the purchaser from him agree that such purchaser will not in turn resell except at the price stipulated by the vendor of the buyer.

"Such provisions in any contract shall be deemed to contain or imply conditions that such commodities may be resold without reference to such agreement in the following cases:

"(a) In closing out the owners stock for the purpose of discontinuing delivering any such commodity.

"(b) When the goods are damaged or deteriorated in quality, and notice is given the public thereof.

"(c) By any officer acting under orders of any court or in the execution of any writ or distress."

"Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling is, or is not, a party to such contract, is unfair competition and is actionable at the suit of such vendor, buyer or purchaser of such commodity."

This Act must be read in connection with Section 1 of the Sherman Act, as amended by the addition of the two proviso clauses known as the Miller-Tydings Amendment (July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693 (15 U.S.C. A. 1)). This Act as so amended reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: Provided Further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity

herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The plaintiff, the manufacturer of a trade-marked product known as "Sunbeam Shavemaster," pleads diversity of citizenship with defendant and bases its claim of the existence of the required jurisdictional amount on the statement that its good will, under certain lawful contracts and its rights under the Pennsylvania Fair Trade Act aforesaid, is in excess of $10,000.00.

Plaintiff further avers that the said Sunbeam Shavemaster is in fair and open competition with commodities of the same general class produced by others; that it is the sole owner of said trade-mark; that the said trade-marked article has a good reputation among wholesalers and retailers and with the public generally; that it has been widely advertised throughout the United States in many nationally distributed publications; that an extremely valuable good will as a consequence of said advertising and of the intrinsic merit of the product attaches to the said article and its trademark; that said article has been and now is sold and

distributed throughout the State of Pennsylvania and plaintiff enjoys a good business therefrom; that plaintiff has entered into a number of retail contracts with retailers doing business in the State of Pennsylvania, and attached to the complaint are copies of the said contracts and Fair Trade Price Lists.

Plaintiff also avers that defendant has been guilty of unfair competition in that it has violated plaintiff's minimum retail price agreements; that he has by advertisement in various publications offered to sell the said trade-marked article at a price less than plaintiff's fair trade price;[1] that plaintiff on several occasions wrote to defendant informing him that its products were sold under the Fair Trade Act of Pennsylvania and requesting defendant to desist from offering for sale or selling said trade-marked article for less than the fair trade price; that plaintiff has received numerous complaints from retailers of its products throughout the country protesting against defendant's cut price advertising; that notwithstanding repeated notifications, defendant wilfully continued to offer for sale and to sell plaintiff's trade-marked Sunbeam Shavemaster at a price of $17.25 still knowing that the fair trade price thereof was $23.50.

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[1]Paragraph V of the complaint states, inter alia, "* * * On page 83 of 'The American Rifleman' for May, 1948, the defendant inserted the following advertisement:

'SCHICK SUPER ELECTRIC SHAVERS
$13.00, Remington Foursome
$14.00, Shavemaster $17.25,
new, latest models. S. A.
Wentling, Palmyra, Penna.'"

Plaintiff finally alleges that such unfair competition on the part of defendant has caused plaintiff great monetary damage and that it has no adequate remedy at law unless defendant is enjoined from further acts of unfair competition.

An answer was filed by the defendant wherein he admitted substantially all of the allegations of the complaint, excepting that he denied that his advertisements constituted offers to sell; denied the jurisdiction of this Court; denied that there was any good will attached to plaintiff's trademark, and finally, for multifarious reasons denied the constitutionality of the Pennsylvania Fair Trade Act. Defendant further filed a counterclaim for damage to his business on the theory that plaintiff's assertion of right under the Pennsylvania Fair Trade Act was contrary to the Sherman Antitrust Act.

Subsequently thereto, and after due notice to defendant, plaintiff took the deposition of Edward K. Ploner, plaintiff's Vice-President. After the filing of the deposition, plaintiff moved for summary judgment under Rule 56, Federal Rules of Civil Procedure, which motion is presently before the Court.

Mr. Ploner in his deposition avers, among other things, that the method of sale and distribution followed by plaintiff is through approximately eight hundred wholesale distributors who, in turn, sell to upward of seventy thousand retailers throughout the entire United State; that its advertising is in national magazines, local newspapers and television; that the company's approximate sales of shavers for 1946 were $1,925,

000.00; in 1947, $4,057,000.00; in 1948, $5,863,000.00, and in the first six months of 1949, $1,847,000.00; that the diminishing sales in 1949 were attributable to the fact the company stayed out of the market for about five months to give their distributors, wholesale and retail, an opportunity to reduce their stock of an old model when a new model was introduced; that the company spent in direct advertising of the Shavemaster in 1946 approximately $98,000.00; in 1947, $250,000.00; in 1948, $354,000.00, and the first six months of 1949, $140,000.00; that when a new model is introduced the company issues a supplement to outstanding Fair Trade contracts in which prices are quoted and the effective date given; that following defendant's advertising the company received complaints from wholesale and retail distributors in Wisconsin, California, Maryland, Delaware, District of Columbia, Pennsylvania, Illinois, Minnesota and Nebraska; that the total sales of Shavemaster in Pennsylvania in 1948 was approximately $420,000.00; that in 1948 the company had about fifty wholesale and seventy-three hundred retail distributors in Pennsylvania; that unchecked violations of Fair Trade prices are detrimental to the sale of trade-marked merchandise.

Thereafter, defendant filed an affidavit setting forth, inter alia, that he never saw any executed contract between plaintiff and any retailer, or the price list shown in Exhibit "A" of the complaint, prior to service of complaint on him; that he did not use the Shavemaster as a loss-leader, and was never notified by plaintiff of the discontinuance of or change in price of Shavemaster.

The complaint avers that following the May, 1948, advertisement in "The American Rifleman" plaintiff on June 8, 1948, wrote defendant as above indicated and attached to this letter two copies of its Pennsylvania Fair Trade Contract, as well as a retail price list, and invited defendant to sign both copies, return to plaintiff after which it would execute a copy and return to defendant and thus include him as one of its cooperating dealers. Defendant continued to advertise as before, whereupon plaintiff again wrote defendant on June 24, 1948, July 23, 1948, and March 4, 1949, and on the latter date by telephone conversation through its counsel again reiterating all that had previously been written. These averments are either admitted or not denied in the answer. The advertisements continued through November, 1948.

In his affidavit defendant avers,

> "2. That he denies ever having seen any executed contract between the Sunbeam Corporation and any retailer prior to service upon him of the complaint.
>
> "3. That he denies ever having seen the price list shown in Exhibit 'A' of the complaint before said complaint was served on him."

The copies of plaintiff's Pennsylvania Fair Trade contracts attached to the complaint as Exhibit "A" purport to be copies of executed contracts. Defendant in his affidavit admits receiving an unexecuted copy of the identical form.

The copy of the price list attached to the complaint as part of Exhibit "A", being the letter and exhibits

referred to therein, which letter defendant in paragraph VI of his answer admits having been forwarded to him, is printed on white paper and quotes prices effective July 5, 1948. Defendant in his affidavit denies the receipt of this price list, but in his answer he admitted the mailing of the letter which referred to the price list and admitted the receipt of a price list printed on yellow paper and which carried the date of April, 1948. Both lists quote the Shavemaster as Cat. No. "3" at $23.50.

From the pleadings, deposition and affidavit there is, in my opinion, no genuine issue as to any material fact.

We have here in the plaintiff the owner of two trademarks, namely, "Sunbeam" and "Shavemaster"; that it advertised and distributed a shaver under those two trade-marks; that it entered into Fair Trade contracts with retailers in Pennsylvania under the provisions of Pennsylvania Fair Trade Act; that defendant with knowledge of outstanding Fair Trade contracts in Pennsylvania and price lists in connection therewith, advertised and sold six Shavemasters for $17.25 each when the listed Fair Trade price was $23.50; that said advertisement specifically used the trade-marked name of "Shavemaster." There is no question but that this plaintiff has at a tremendous expense built up a good will for its trade-marked products.

I see no merit in defendant's captious complaints about his lack of knowledge. He admits receiving a copy of plaintiff's blank form Pennsylvania Fair Trade contract. He complains he did not see an ex-

ecuted copy thereof. I find nothing in the Act to indicate that defendant would be entitled to a copy of an executed contract. He was given a copy of the form of contract used in Pennsylvania and he was told that it was such. That was sufficient notice.[2]

Whether the copy of the price list attached to the complaint giving the effective date as of July 5, 1948, is or is not the same as defendant admits receiving and which was dated April, 1948, is entirely aside from the point. The fact remains both carried the only item we are here concerned with, with the same catalogue number and same price.

Finally, the defendant complains that he was not advised of subsequent price lists. So far as the record goes, the price of this article remained constant throughout the period covered by defendant's advertisements. The objection is therefore without merit.

In Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, the court had before it Sections 1 and 2 of the Illinois Fair Trade Act (Smith-Hurd Rev. Stat., 1935, Ill., c. 121½, Sections 186 and 189) which at that time was substantially the same as Sections 1 and 2 of the Pennsylvania Act. In holding that the Illinois Act was not in violation of the Four-

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[2]In Bristol-Myers Co. v. Lit Brothers, Inc., 336 Pa. 81, the court quoted a finding by the chancellor as follows:

" 'That after defendant had notice * * * that plaintiff had entered into contract with others fixing the resale price of plaintiff's products, it always sold Ipana Tooth Paste * * * and Sal Hepatica * * * at the resale prices fixed by plaintiff in contracts with others';"

teenth Amendment to the Constitution of the United States, the court stated, inter alia,

"In the second place, § 2 does not deal with the restriction upon the sale of the commodity qua commodity, but with that restriction because the commodity is identified by the trade-mark, brand or name of the producer or owner. The essence of the statutory violation then consists not in the bare disposition of the commodity, but in a forbidden use of the trade-mark, brand or name in accomplishing such disposition. The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself.

* * * * * * * *

"* * * Section 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates 'unfair competition.' * * *

"There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business

of the producer and distributor of identified goods, but injurious to the general public as well. * * *"

I find no merit in any of the defendant's many reasons advanced in an effort to prove that the Pennsylvania Fair Trade Act is in violation of the Constitution of the United States or the Constitution of the Commonwealth of Pennsylvania.

As stated in Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra, even though this plaintiff parted with the ownership of the six shavers involved in this case, it did not part with the good will that it had at great expense built up around the trade-mark name of those razors, namely, "Sunbeam" and "Shavemaster." This defendant did not advertise merely a razor for sale, he advertised a "Shavemaster" electric razor. By so doing he has invaded a right that this plaintiff has been given by the Fair Trade Act of the Commonwealth of Pennsylvania in respect to a sale made under the terms of that Act and that trade-mark must be kept inviolate whether the sale is intrastate or interstate.

It is true the Pennsylvania Supreme Court has never passed upon the constitutionality of the Pennsylvania Fair Trade Act; on the other hand, it has not hesitated to construe and enforce the Act.[3]

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[3]Lentheric, Inc. v. F. W. Woolworth Co., 338 Pa. 523; Bristol-Myers Company v. Lit Brothers, Inc., 336 Pa. 81. In the latter case the court held that the peculiar facts of the case did not of themselves amount to such unfair competition as the Fair Trade Law forbids. Under the circumstances I feel that Shipman, et al. v. DuPre, 94 L. Ed. 587, has no application here.

In a very well considered opinion in Pepsodent Co. v. Krauss Co., Limited, (D.C.E.D. La.) 56 F. Supp. 922, Judge Borah stated, "The history of the legislation leaves no doubt that Congress enacted the Miller-Tydings amendment with full knowledge of the provisions in state fair trade acts making resale price maintenance effective against non-contracting retailers, and that it was the design and intention of Congress to remove every obstacle which would hinder the free enforcement by the states of the provisions of their local fair trade acts in such fashion as their respective legislatures saw fit."

Congress has spoken and the legislature of Pennsylvania has spoken and there is no doubt in my mind what was the legislative intent in both instances. As to the wisdom of such legislation, we are not here concerned. As indicated above, I find nothing in the legislation violative of either the Constitution of the United States nor that of the Commonwealth of Pennsylvania.[4] All of the jurisdictional requirements are present here.

I am, therefore, of the opinion that the admitted acts of the defendant in cutting the price of plaintiff's trade-marked product are in direct violation of the Fair Trade Act of the Commonwealth of Pennsylvania; that the actions of the defendant threaten irreparable damage to the plaintiff;[5] that the plaintiff has no

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[4]For a very able discussion of the constitutionality of a Fair Trade Act of the State of South Carolina similar to that of the Commonwealth of Pennsylvania, see Miles Laboratories, Inc. v. Seignious (D.C.E.D. S.C.) 30 F. Supp. 549.

[5]Apropos of the propriety of injunctive relief in the instant case, in Swift & Company, et al v. United States,

adequate remedy at law and is entitled to the injunctive process of this Court for its protection. A decree for permanent injunction is being filed contemporaneously with this opinion.

June 10, 1950

(s) FREDERICK V. FOLLMER,
United States District Judge.

III.

DECREE

Now, to wit., June 10, 1950, the defendant, S. A. Wentling, is permanently enjoined and restrained from committing further acts of unfair competition in relation to Fair Trade marked products of plaintiff, Sunbeam Corporation, and from violating said plaintiff's fair trade agreements, and the defendant's counterclaim is dismissed.

(s) FREDERICK V. FOLLMER,
United States District Judge.

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276 U.S. 311, 48 S. Ct. 311, 72 L. Ed. 587, Mr. Justice Brandeis, speaking for the court, said:

> "The argument ignores the fact that a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction may issue to prevent future wrong, although no right has yet been violated."

[fol. 18] [Stamp:] Received & Filed Aug. 21, 1950. Ida O. Creskoff

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 3400

District Court of Pennsylvania for Middle District of Pennsylvania

SUNBEAM CORPORATION, a Corporation,

vs.

S. A. WENTLING

MOTION FOR LEAVE TO DOCKET APPEAL AND FILE RECORD OUT OF TIME

To the Honorable, the Judges of Said Court:

S. A. Wentling, by Samuel A. Schreckengaust, Jr., of McNees, Wallace & Nurick, attorneys for defendant, moves your Honorable Court for leave to docket the appeal and file the record out of time in the above-captioned proceeding, and in support of his motion, sets forth the following facts:

1. Notice of appeal was given in the above-captioned proceeding on July 7, 1950.

2. On August 8, 1950, following receipt of notice from the Clerk that the record on appeal was received from the District Court, Samuel A. Schreckengaust, Jr., Esquire, the undersigned, sent by regular mail a check for twenty-five dollars ($25.00) to the Clerk to cover the Clerk's fees, together with a duly executed appearance form. A copy of said transmittal letter is attached hereto.

3. On August 17, 1950, the Clerk advised counsel that the requested check was not received by the Clerk within the forty day period allowed by the rules of court, which period expired August 16, 1950.

4. It is the intention of the defendant to prosecute his appeal, and in view of the unexplainable disappearance of said letter containing the check covering the Clerk's fees, leave to docket the appeal and file the record out of time is hereby requested.

[fol. 19] A substitute check for $25.00 is tendered with this motion.

Samuel A. Schreckengaust, Jr. of McNees, Wallace & Nurick, Commerce Building, Harrisburg, Pa. Attorneys for Defendant.

August 18, 1950.

[fol. 20] WAIVER OF OBJECTION

Sunbeam Corporation, by Joseph D. Morelli, Esquire, of White, Williams & Scott, attorneys, hereby waives all objections to the granting of defendant's foregoing motion for leave to docket appeal and file record out of time.

Joseph D. Morelli of White, Williams & Scott, Land Title Building, Philadelphia, Pa., Attorneys for Plaintiff.

Dated: August 21, 1950.

[fol. 21] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 3400

District Court of Pennsylvania for Middle District of Pennsylvania

SUNBEAM CORPORATION, a Corporation,

vs.

S. A. WENTLING

ORDER

Defendant's motion for leave to docket appeal and file record out of time is hereby allowed, and the Clerk is directed to docket the case and file the record in the above-captioned proceeding.

So ordered.

Kalodner, *J.*

August 21, 1950.

[fol. 22] [Endorsed:] In the U. S. Court of Appeals for the Third Circuit. No. 3400. District Court of Penna. for Middle District of Pennsylvania, Sunbeam Corporation vs. S. A. Wentling. Motion for Leave to Docket Appeal and File Record Out of Time and Order to Docket Case and File Record.

[fol. 23] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,280

SUNBEAM CORPORATION, a Corporation,

v.

S. A. WENTLING, Appellant

Appeal from the United States District Court for the Middle District of Pennsylvania

Argued November 10, 1950

Before Maris, Goodrich and Hastie, Circuit Judges

OPINION OF THE COURT—Filed December 8, 1950

By GOODRICH, Circuit Judge:

This appeal involves the application of the Pennsylvania Fair Trade Act.[1] The plaintiff, a manufacturer of electric shavers, complained of violation of the Act by the defendant, an individual retailer doing a mail order business from headquarters in Palmyra, Pennsylvania. The plaintiff claimed, and the defendant does not deny, that the defendant advertised and sold some of the plaintiff's razors at a price lower than the so-called fair trade price. The District Court granted relief in very broad terms.[2]

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[1] Act of June 5, 1935, P.L. 266, as amended June 12, 1941, P.L. 128, 73 Purdon's Pa. Stat. Ann. §§ 7 and 8.

[2] Defendant was "permanently enjoined and restrained from committing further acts of unfair competition in relation to Fair Trade marked products of plaintiff, Sunbeam Corporation, and from violating said plaintiff's fair trade

[fol. 24] The defendant conducts a mail order business. He advertises merchandise in publications of national circulation[3] and invites orders for the articles advertised. These articles he ships by mail or express to the buyers. What portion of the defendant's sales results in shipments to Pennsylvania buyers and what portion results in shipments to out-of-state buyers is not disclosed.

The defendant has signed no contract agreeing to maintain a minimum price on plaintiff's razors. But the plaintiff claims that it is entitled to relief under the non-signer provision of the statute which states.

> "Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling is, or is not, a party to such contract, is unfair competition and is actionable at the suit of such vendor, buyer or purchaser of such commodity." 73 Purdon's Pa. Stat. Ann. §8.

The case involves several points which we shall consider one at a time.

(1) The constitutionality of fair trade legislation under the United States Constitution and that of the Commonwealth of Pennsylvania with regard to due process and equal protection provisions.

This need not detain us long. Similar legislation was pronounced not violative of the federal Constitution in Old Dearborn Company v. Seagram Corporation, 299 U.S. 183 (1936). The plaintiff suggests that the depression conditions which prompted that result in 1936 no longer obtain and if the case now came to the Supreme Court it would be decided the other way. Perhaps so; perhaps not. We

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agreements * * *." In the course of its opinion the District Court states, "The trade mark must be kept inviolate whether the sale is intrastate or interstate." Sunbeam Corp. v. Wentling, 91 F. Supp. 81 (M.D. Pa. 1950).

[3] The advertisements of which defendant complains appeared in two nationally circulated magazines, The American Rifleman and Field and Stream, and in the November 28, 1948, issue of the Boston Sunday Advertiser.

[fol. 25] think, however, the Supreme Court decision settled the constitutionality of the Fair Trade acts so far as due process and equal protection under the Fourteenth Amendment are concerned. We should and do follow it so long as it stands as a declaration of law by the Supreme Court.

Nor do we need to take long in holding the Pennsylvania statute free from attack on the due process or equal protection clauses of the Pennsylvania Constitution. It is true that the Pennsylvania Supreme Court has not passed, in so many words, on the constitutionality of the Act under the Pennsylvania Constitution. But it has applied it, apparently without question of its constitutionality.[4] A Common Pleas Court of Philadelphia has definitely declared it to be constitutional.[5] And the overwhelming weight of decision in other state courts is to the same effect.[6] Whatever may be the wisdom of this legislation we think it well established that legislatures, in enacting it, are not violating the provisions of the United States Constitution as to due process, or equal protection, or the state constitutional equivalents thereof.

(2) The Miller-Tydings Act. This statute[7] was much discussed by both parties at the argument. We think the statute was intended to relieve persons entering into contracts of the type provided for in these fair trade acts from liability under United States anti-trust laws.[8] The legislation was necessary, if such immunity was to be had,

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[4] Lentheric, Inc. v. F. W. Woolworth Co., 338 Pa. 523, 13 A. 2d 12 (1940).

[5] Welch Grape Juice Co. v. Frankford Grocery Co., 36 Pa. D. & C. 653 (1939).

[6] Since the Seagram case the acts have been held unconstitutional in only one state, Liquor Stores, Inc. v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949). For a list of cases in which the various acts have been passed upon see 2 CCH-Trade Reg. Service § 7128.

[7] 26 Stat. 209 (1937), 15 U. S. C. A. § 1.

[8] In Shwegmann Brothers v. Calvert Distillers Corp., 184 F. 2d 11, 15 (5th Cir. 1950) the court states that the Miller-Tydings amendment "neither authorizes nor prohibits state legislation * * * It is concerned with, and only with, the Sherman Act, legislation by Congress affecting interstate commerce."

because price maintenance agreements had previously been [fol. 26] held to be a violation. Dr. Miles Medical Company v. John D. Parrk & Sons Company, 220 U.S. 373 (1911) (Sherman Act); FTC v. Beech Nut Packing Co., 257 U.S. 441 (1922) (Federal Trade Commission Act). But the Miller-Tydings Act in no way, we think, affects any question of defendant's liability to plaintiff.

In this regard the case of Whitfield v. State of Ohio, 297 U.S. 431 (1936) presents an interesting parallel. In the Hawes-Cooper Act, 49 U.S.C.A. § 60, Congress authorized the states to regulate the sale of prison-made goods even though manufactured in another state and sold within the state in the original package. Ohio had forbidden the sale of such goods in open market and defendant was convicted of violation of the statute. The information involved contained two counts, one based on a sale within Ohio, the other on a sale to an Ohio buyer from an Alabama seller. The Court stated[9] that "A serious question as to the infringement of the commerce clause of the Constitution is presented by the second count * * *," but found it unnecessary to pass on this since the conviction was sustained by the first count which was valid because of the Hawes-Cooper Act. Thus, even though Congress had expressly left the field to state regulation, the Court intimated Congress either had not or could not authorize the states directly to regulate an interstate sale. The case is not controlling here, but is an indication that we should be wary of interpreting the Miller-Tydings Act as anything more of an authorization to the states than the words require.

(3) Application of the statute to interstate transactions. Some at least of the defendant's business is interstate commerce. That point seems to us abundantly clear, but since the parties seemed to have some dispute about it we will stop on it for a moment. First, the purchase of advertising space in a publication published in another state [fol. 27] and of national circulation is interstate commerce.[10] Likewise, when defendant receives an order from

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[9] Whitfield v. State of Ohio, supra, at 437.

[10] To the extent that Blumenstock Bros. v. Curtis Publishing Co., 252 U. S. 436 (1920) can be construed as holding to the contrary we think it is no longer authoritative in the light of more recent cases. United States v. South-

outside Pennsylvania for an article which he fills by mailing it or sending it by express from Palmyra to a point in another state a transaction in interstate commerce has taken place. It is immaterial, so far as this point is concerned, whether "title" passes at the place of shipping or at destination.[11] The shipment would be equally an interstate matter if no passing of title were involved in the transaction. For instance, if A, in Pennsylvania, sends a Sunbeam Shavemaster to his friend in New York as a loan no passing of "title" is involved. But the shipment is certainly interstate commerce.

To state that defendant's business is interstate commerce does not answer the question of the applicability of a Fair Trade Act to such commerce. It is well settled that in the absence of an occupation of the field by Congress a state may regulate some aspects of interstate commerce.[12] But it is just as well settled that even in the absence of Congressional action the commerce clause is a limitation on the power of states to regulate interstate commerce. A state may not regulate the rates [13] or length [14] of trains even on the intrastate portion of an interstate journey; it may not prohibit the importation into the state

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Eastern Underwriters Assoc., 322 U. S. 533 (1944); North American Co. v. SEC, 327 U.S. 686 (1946). Cf. Indiana Farmers Guide Co. v. Prairie Co., 293 U. S. 268 (1934); Charles A. Ramsay Co. v. Associated Bill Posters of United States and Canada, 260 U.S. 501 (1923); Post Printing & Pub. Co. v. Brewster, 246 Fed. 321 (D.C. Kan. 1917); State v. Salt Lake Tribune Pub. Co. 68 Utah 187, 249 Pac. 474 (1926).

[11] Uniform Sales Act § 19, Rule 5. Act of May 19, 1915, P.L. 543 § 19, 69 Purdon's Pa. Stat. Ann. § 143. Since defendant pays the cost of transportation, including insurance against loss, the presumption is that the "sale" takes place outside Pennsylvania as to out-of-state customers.

[12] Cooley v. Board of Wardens, 12 How. 299 (U. S. 1852); California v. Thompson, 313 U. S. 109, 113 (1941); California v. Zook, 336 U. S. 725 (1949).

[13] Wabash, St. Louis and Pacific Ry. v. Illinois, 118 U. S. 557 (1886).

[14] Southern Pacific Co. v. Arizona, 325 U. S. 761 (1945).

[fol. 28] of liquor from another state,[15] nor prohibit its sale by one who purchased it from a seller in another state and while still in the original package;[16] it cannot restrict the export or import of goods for the protection of local economic interests.[17] As Professor Rottschaefer puts it, "One aim of the commerce clause was the protection of interstate trade against state interference. As a limit on state powers, it is a free trade charter for national commerce."[18]

As in so many Constitutional questions the line between permissible and prohibited state regulation is not a clear one. Chief Justice Stone, in Southern Pacific Co. v. Arizona, 325 U.S. 761, 770 (1945) voiced what is apparently

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[15] Bowman v. Chicago & N. W. Ry., 125 U. S. 465 (1888). The Webb-Kenyon Act, 37 Stat. 699 (1913), 27 U. S. C. A. § 22, now prohibits the interstate transportation of intoxicants into any state for use thereof in violation of its laws. It was upheld in Clark Distilling Company v. Western Maryland Railroad Co., 242 U. S. 311 (1917). See McGovney, The Webb-Kenyon Act and Beyond, 3 Iowa L. Bulletin 145 (1917).

[16] Leisy v. Hardin, 135 U. S. 100 (1890). As to intoxicating liquor the rules were changed by the Wilson Act, 26 Stat. 313 (1890), 27 U. S. C. A. § 121 which authorized the states to prohibit the resale of liquor. This Act was said to deprive intoxicating liquor of its interstate commerce character.

[17] Hood & Sons v. DuMond, 336 U. S. 525 (1949); Baldwin v. Seelig, 294 U. S. 511 (1935); Pennsylvania v. West Virginia, 262 U. S. 553 (1923).

[18] Rottschaefer, The Constitution and Socio-Economic Change, 102 (1948). The same idea was forcibly stated by Mr. Justice Jackson thus, "The material success that has come to the inhabitants of the states which make up this federal free trade unit has been most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions." Hood & Sons v. DuMond, 336 U. S. 525, 538 (1949).

the presently accepted approach.[19] He said that "there has been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern. * * * The matters for ultimate determination are * * * whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate [fol. 29] commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference"

It is not difficult to put a case in which non-uniform state laws in this price regulation field will result in a complete block to trade between states in "fair traded" commodities. Here is one. There is no requirement that the established fair trade price be uniform throughout the states.[20] Thus, we have the possibility of a situation where, for instance, the fair trade price of an article has been fixed in Pennsylvania at $1 and in South Carolina at 75 cents. If the Pennsylvania statute is permitted to govern interstate sales, no sales in that commodity can be made by Pennsylvania sellers to South Carolina buyers. If the Pennsylvania seller were to meet the competition of South Carolina sellers, he would commit a tort in Pennsylvania, and yet he would be selling at the very price set in South Carolina as "fair trade." Further, if a state may regulate the price at which an article must be sold if it is to be

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[19] For an excellent and up-to-date discussion of this problem see Dowling, Constitutional Law, Significant Developments in the Law During the War Years, 9 (Practising Law Institute Series, 1948).

[20] The Acts of 30 states authorize a minimum price, whereas the others provide for an absolute price; in 24 states a person other than the owner of the trademark may establish the price, in 21 any other person may not; in 29 states obliteration of the trademark exempts the commodity from the Act, in 13 it does not. For a compilation of these and other variations see 2 CCH-Trade Reg. Service §§ 7011-13.

shipped out of the state, may it not equally well regulate the price for which the article must have been sold before it is allowed to come into the state? Tariff barriers are but feeble obstacles compared with such a blockade on the interstate movement of goods.

The possibility of such a barrier to interstate commerce from non-uniform state regulation illustrates the substantial effect such regulation will have on interstate commerce if applied to interstate sales. Such sales are a fit subject for uniform regulation should Congress desire it, and we see no peculiar local interest which justifies the imposition upon interstate commerce of such restriction by individual states. The local cut-price sale with a loss leader feature, which seems to have constituted a much [fol. 30] stressed argument for the legislation, is adequately cared for in giving the statute a local application only.

These grave constitutional difficulties involved in any broader interpretation lead us to the conclusion that the Pennsylvania Fair Trade Act is to be construed as not to apply to sales by Pennsylvania retailers to consumers in other states, or to advertisements in publications published in other states. The California court dealing with a statute similar to that of Pennsylvania was so sure of this point that it hardly gave the question discussion and construed the California Fair Trade Act "as applying only to transactions within the state, that being the sole territorial extent of the legislature's powers." Max Factor and Company v. Kunsman, 5 Cal. 2d 446, 55 P. 2d 177 (1936). New Jersey has evidently thought the same about its statute.[21] We think a similar construction should be given to the Pennsylvania statute. We are reinforced in this conclusion by the well established line of authority which interprets a statute to conform to constitutional limitations whenever it is possible to do so.[22]

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[21] Johnson & Johnson v. Weissbard, 121 N. J. Eq. 585, 586, 191 Atl. 873 (1937). For a general discussion of the problem and a conclusion similar to that reached here, see 2 CCH-Trade Reg. Service § 7308.

[22] See Kovacs v. Cooper, 336 U. S. 77, 85 (1949); Alabama State Federation of Labor v. McAdory, 325 U. S. 450, 470 (1945); Arizona Employers' Liability Cases, 250 U. S. 400, 430 (1919); United States v. Weisenbloom, 168 F. 2d 698, 700 (2d Cir. 1949).

In view of the position we take on this matter a modification of the District Court decree will be necessary. The decree will be vacated and the case remanded to the District Court with directions to enter a decree limiting the injunction against the defendant to intrastate transactions in Pennsylvania, and for further proceedings not inconsistent with this opinion.

A true Copy:

Teste:

—— ——, Clerk of the United States Court of Appeals for the Third Circuit.

[fol. 31] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,280

SUNBEAM CORPORATION

vs.

S. A. WENTLING, Appellant

On Appeal from the United States District Court for the Middle District of Pennsylvania

Present: Maris, Goodrich and Hastie, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decree of the said District Court in this case be, and the same is hereby vacated, with costs, and the case remanded to the District Court with directions to enter a decree limiting the injunction against the defendant to intrastate transactions in Pennsylvania, and for further proceedings not inconsistent with the opinion of this Court.

Attest:

Ida O. Creskoff, Clerk.

December 8, 1950.

(Received & Filed Dec. 8, 1950. Ida O. Creskoff, Clerk.)

[fol. 32] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10280

SUNBEAM CORPORATION, a Corporation

vs.

S. A. WENTLING

ORDER

And Now, to wit, this 20 day of December, 1950, in consideration of the within petition, the plaintiff is granted an extension of time to file its petition for rehearing in the above matter until the Second of January, 1951.

Goodrich, *J.*

(Received & Filed Dec. 20, 1950. Ida O. Creskoff, Clerk.)

[fol. 33] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10280

SUNBEAM CORPORATION, a Corporation

vs.

S. A. WENTLING

PETITION FOR ORDER EXTENDING TIME FOR THE PLAINTIFF TO FILE A PETITION FOR REHEARING

To the Honorable the Judges of the Court of Appeals for the Third Circuit:

Sunbeam Corporation, plaintiff in the above captioned matter hereby petitions the court for an extension of the time in which it may file a petition for rehearing and by its counsel extends the following reasons therefor:

1. The opinion of this court was filed on December 8th but not received by plaintiff's counsel until December 11th.

2. The opinion of the court has raised matters not considered or not fully discussed in the briefs of the parties

herein. Plaintiff's local counsel and plaintiff's general counsel have been engaged in investigating the problem so raised and this has taken hours of study by counsel involved.

3. Plaintiff's general counsel, because of the serious effect of the court's decision upon the plaintiff and its merchandising policies, is particularly desirous that the [fol. 34] petition for rehearing when filed give this court the full benefit of his thoughts and suggestions. Since the plaintiff's general counsel resides in Chicago, Illinois, a series of air mail letters have passed between Chicago and Philadelphia. Due to the Christmas season, there has been delay in the receipt of some of these letters.

4. Under the rules of court the petition for rehearing should be filed on Saturday, December 23rd, or presumably the next day on which the court will be open, namely December 26th.

5. By reason of the foregoing facts, plaintiff's counsel is unable to properly prepare and have printed the petition in the time allotted by the rules of court.

Wherefore, Petitioner prays the court to grant an order extending until January 2nd, the time within which plaintiff may file the petition for rehearing in this case.

Respectfully submitted, William H. Peace, II, Attorney for Plaintiff.

[fol. 35] [Endorsed:] In the United States Court of Appeals for the Third Circuit. No. 10280. Sunbeam Corporation, a Corporation vs. S. A. Wentling. Petition for Order Extending Time for the Plaintiff to File a Petition for Rehearing and Order Thereon. William H. Peace, II, White, Williams & Scott, Land Title Building, Philadelphia, 10.